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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 384 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? yes

2. To be referred to the Reporter or not? yes

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3. Whether Their Lordships wish to see the fair copy  
of the judgement? no

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? no

5. Whether it is to be circulated to the Civil Judge?  
no

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HARSHADKUMAR M PATEL

Versus

K C D GANGWANI

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Appearance:

Ms V.D NANAVALI & Asim Pandya for Mr.

S.I. Nanavati for Petitioners

MR JD AJMERA for Respondent No. 1

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 15/07/96

ORAL JUDGEMENT

Present petition is filed under articles 226 and  
227 for quashing and setting aside the orders passed by  
the respondents nos 1 and 2 dated 15.11.84 and 16.6.83

respectively. The petitioner no. 1 M/s Harshadkumar M. Patel is a partnership firm registered under the Indian Partnership Act. Petitioner no.2 is the power of attorney holder of petitioner no.1 firm. The petitioner no.1 firm is carrying on activities of trading in diamond and precious stones in room no.23, "Modeshwari Bhavan" since 1.4.76. They have also got registration under the Bombay Shops and Establishment Act 1948 with effect from 29.7.80. In the said Modeshwari Bhavan there are other tenants and out of these tenants, 22 tenants are diamond cutters and polishers and they are carrying on their business of diamond cutting and polishing in their respective premises. The Inspector of respondent no.2 made a report to respondent no.2 claiming therein that these 22 diamond cutters and polishers are employees of the petitioner no.1 and that the provisions of Employees Provident Fund and Misc. Provisions Act 1952 (hereinafter referred to as the Act) are applicable to the petitioner no.1. After the said report, the respondent no.2 issued an order under section 7-A of the said Act informing the petitioner no.1 that provisions of the said Act are applicable to the said firm and that the said firm was allotted Licence No. GJ/12049 and that they should start making contribution under the said Act as well as the scheme under the said Act from May 1980 and comply with the said order. The petitioner no.1 thereupon made a report claiming therein that those 22 diamond cutters and polishers are independent and individual businessmen and that the petitioner no.1 firm had no concern with the same. The employees of the said 22 units could not be said to be employees of the petitioner no.1 firm and the action taken against them under the said Act was improper and ill founded and therefore, the same should be revoked. But the said representation was turned down by respondent no.2 by passing an order dated 16.6.83.

2. It seems that thereafter the present petitioner no.1 had filed a writ petition in this Court being SCA No. 3465/83. Said petition was disposed of on 26.7.83 with observations that the petitioners were to make a detailed representation to the respondent no.1 who would consider the same on merits and dispose of the same in accordance with law. Accordingly the petitioners made a representation before the respondent no.1 to revoke the order passed by respondent no.2 on 16.6.83 and to set aside and quash the action taken by respondent no.2 under the provisions of the said Act, against the petitioner no.1. But unfortunately for the petitioners, said representation made by the petitioner no.1 to the respondent no.1 was not accepted and the same was

rejected by respondent no.1 by his order dated 15.11.84 confirming the order passed by the respondent no.2. Consequently the petitioners have come before this Court.

3. It is true that the action taken against the present petitioner no.1 is an action under the provisions of the said Act. The provisions of the said act are benevolent provisions enacted in order to benefit the workers. In the case of Sayaji Mills Ltd. vs Regional Provident Fund Commissioner 1984(Supplementary) SCC 610, the following principles are laid down. " Provident Fund Act is a beneficent statute which should be construed so as to advance the object with which it is passed. Any construction which would facilitate evasion of the provisions of the Act should as far as possible be avoided. Section 16 of the Act, being a clause granting exemption to the employer from the liability to make contribution, should receive a strict construction." Therefore, bearing this aspect should be kept in mind I proceed to consider the various contentions raised before me.

4. There is no dispute of the fact that the petitioner no.1 firm is trading in Diamonds and precious stones. They purchase raw diamond and they get the same cut and polished through the other persons including some of the 22 firms referred to by the respondent no.2 in his order and then sell the said cut and polished diamond to various customers. There is also no dispute of the fact that petitioner no.1 as well as these 22 diamond cutters and polishers have got separate registrations under the Bombay Shops and Establishments Act. It is also an admitted fact that the petitioner firm is paying income tax separately and all those 22 units are also having separate income-tax numbers and they are also paying separate income-tax. It is also an admitted fact that the petitioner no.1 firm's business premises and the business premises of the said 22 units are situated in one and the same premises viz. Modeshwari Bhavan and they are on one floor.

5. It seems from the materials on record that the Inspector of Provident Fund Department and the respondent no.2 was more influenced by the admitted fact that the petitioner no.1 firm and those 22 units are having their business on one and the same floor in one and the same building. Because of this admitted position, it seems that the respondent no.2 and the Provident Fund Inspector working under him were straight way induced in claiming that the petitioner no.1 and those 22 units are one and the same Institution or factory. That would be quite

clear from the following observations made by the respondent in his order dated 15.11.84.

"These small rooms have been got registered under the local Shops and Establishment Act so as to give a colour of an independent establishment. The workmen work there and do job of cutting and polishing diamonds. There may be a supervisor to supervise their working and this supervisor might have been designated as owner of the establishmentg. But it cannot be denied that precious diamonds cannot be left in the charge of workmen or with the so called owner of the establishment without the constant vigil of the petitioner's establishment who really own these diamonds in whatever form they are that is why the processing of diamonds goes on in the adjoining small rooms so as to enable the petitioner's establishment to keep constant vigil on the working in the small rooms."

But the respondent no.1 as well as respondent no.2 have not at all taken into consideration that the building Modeshwar Bhavan is not owned by petitioner no.1 or its partners. Respondent no.1 as well as the respondent no.2 Provident Fund Inspector working under him also did not take into consideration that there is nothing on record to show that any of the partners of petitioner no.1 firm are also partners or owners of those 22 units. Thus there is absolutely no material on record to show that either petitioner no.1 or any of the partners of petitioner no.1 has got any control over on any of these 22 units. The respondent no.1 as well as respondent no.2 have imagined that there must be direct control and supervision of petitioner no.1 or working in the 22 units as those 22 units are situated on the same floor and as the work to be carried on in those 22 units was the work of diamond cutting and polishing. But there is nothing in the order to indicate that in fact either the petitioner or any of its partners was having supervision over the actual working of these 22 units.

6. The petitioner no.1 had produced affidavit of those 22 units and the order passed both by respondents nos. 1 and 2. It does not indicate that there was consideration of any of the affidavits filed by the proprietors of those 22 units. Out of these 22 units, the unit of Keshavlal Narsibhai had started his business on 5.1.76 as per his affidavit; whereas the petitioner no.1 started his business on 1.4.76. It is very

difficult to accept the claim of respondents nos 1 and 2 that the business which is started by the said Keshavlal Narsibhai and persons working in his unit are employees of the petitioner no.1 firm who started his business about more than 3-1/2 months after Keshavlal started his business. Out of the said affidavits, Parshottambhai Nathubhai, Bipin Gokaldas. Parshottambhai Alandbhai, Govindbhai Devjibhai, Jadavbhai Haribhai, Vallabhbbhai Bhimjibhai, Sureshkumar Popatlal Patel, Govindbhai Jadavbhai and Dhirajlal Popatlal have stated in their affidavits that none of them is taking or carrying on the work of cutting and polishing the raw diamond and precious stones of the petitioner no.1 firm. When these persons are saying that they are not at all doing any work for petitioner no.1 firm, it is very difficult to hold that they are workers of petitioner no.1 firm.

7. It seems from the order passed by respondents nos 1 and 2 that they are also aware of the fact that in the income returns, the petitioner no.1 firm is showing payment of Rs/ 48 lacs to the job workers for cutting and polishing of diamond. When the petitioner firm is not having its own unit of cutting and polishing diamond and when the petitioner no.1 is having business of selling , cut and polishned diamond and precious stones after purchasing the raw diamond and precious stones from others, it is natural that will have to get the said work done through persons who are capable to carry out the said job. When the said job is obtained from them, naturally they have to be paid for the same. But merely because the amounts paid to them are shown in the accounts of the petitioner no.1 firm, it could not be said that those other 22 tenants who are carrying on business of diamond cutting and polishing are the employees of the petitioner no.1 firm. It seems that on account of the payment of the said charges, respondents nos 1 and 2 are taking those proprietors of 22 units as contractors of petitioner no.1 firm. But if the provisions of section 2(F) of the said Act are considered then, it would be quite clear that as per the said provision, there must be a contract between the contractor and the petitioner no.1 firm for bringing the labour to be employed by the petitioner no.1 firm. The contractor for the purpose of section 2(f) is clearly a labour contractor and not an independent contractor who contract to supply finished product to the establishment but for the purpose of manufacturing of such finished products engages his labour for his own purpose. The material on record as well as the order of respondents nos 1 and 2 do not indicate that there was any contract between the petitioner no.1 firm and the proprietors of

those 22 units of diamond cutters and polishers that any of those 22 firms to supply labourers to the petitioner no.1 firm to carry out their job.

8. Respondents nos 1 and 2 have admitted the commodity in which the petitioner no.1 firm is dealing is very precious and very valuable commodity. In view of the peculiar nature of the commodity the person who is carrying out the job of cutting and polishing these diamond and other precious stones would try to see that he is taking least risk by way of security. To carry the diamond and other precious stones from one place to another place is more risky and there is a question of safety. Therefore, in the circumstances if some of the diamond cutters and polishers thought it proper to have their establishments in the very premises in which they could get job work, then that act on their part could not be taken into consideration for the purpose of showing that those persons who supply them job work of cutting and polishing diamonds, are one and the same unit.

9. Respondents nos 1 and 2 have also relied upon the circumstance that cutting and polishing of diamond was to be carried on by these polishers and cutters as desired by the petitioner no. 1 firm. When the job of these polishers and cutters is of only cutting and polishing, that job was to be carried on as per the desire or directions of the person who entrusts that job to him. The person who gives the job of cutting and polishing would naturally like to see that the job is carried on as desired by him. Therefore, in the circumstances, merely because the job is carried on as desired by the petitioner no.1 firm and that the petitioner no.1 firm will also be entitled to get polishing and cutting as per its own order would not amount to he being employer of the diamond cutters and polishers.

10. Learned advocate for the respondents has placed reliance upon two cases viz. A.I.R. 1974 (SC) 37 in the case of Silver Jubilee Tailoring House and ors. vs. Chief Inspector of Shops and Establishments and anor. and A.I.R. 1987 SC 447 in the case of M/s P.M.Patel & Sons & ors. vs. Union of India & ors. But from the facts and circumstances of both the cases, it would be quite clear that they are not at all applicable to the facts of the case before me. In the first case, the appellant before the Apex Court had a tailoring shop and he was getting the work done through other persons. For that purpose he was providing them all raw materials and

he was also providing his sewing machines. No doubt those persons who were carrying out the said job were not having any fixed working hours and they were at liberty to work with others and even not to work except the job given by the appellant. But in view of the fact that the appellant was providing them sewing machines as well as raw materials and was at liberty to reject the work carried on by them and to get the restitching and further not to give them work any more, it was held that the relation of those workers and the appellant was that of employer and employee. In the second case the workers of beedi rolling at home were treated as employees or owner of Beedi factories. The facts in both these cases are not prevailing in the case before me. In the affidavits of other diamond cutters and polishers, they have clearly stated that the machinery used by them in cutting and polishing diamond are of their own ownership. Not only that they have further mentioned that they are not even financed by the petitioner no.1 in purchasing the said machinery. They have also stated that they are free to accept the job of cutting and polishing diamond of the petitioner and also from other persons. At the cost of repetition, it must be stated that out of these 22 persons, 8 persons are not at all doing any job for the petitioner no.1 firm. The only circumstance which is common between the case of AIR 1974 S.C. 47 and the present case is that the petitioner no.1 firm is free to ask the said diamond cutter and polisher to carry out the work as per his directions if they are not carrying out the same when the raw material was entrusted to them. But merely because of this single circumstance it could not be said that they are employees of the petitioner no.1 firm.

11. Ms. Nanavati for the petitioner no.1 cited before me the case of Karachi Bakery vs. R.P.F. Commissioner reported in 1990 (2) LLN 630. In the said case the appellant before Their Lordships had employed six full time and 5 part time employees. It had entered into contract with two other businessmen for supply of breads to it. Raw materials for the products were supplied by the appellant. The Division Bench judgment of Andhra Pradesh High Court in that case held that those two other bakery owners were only having a contract to supply bakery products and they were not contractors to supply labourers and therefore, the employees of those two bakeries could not be the employees of the appellant. The said decision of the Division Bench of Andhra Pradesh High Court is applicable on all fours to the case before me.

12. Therefore, in view of the above consideration and discussion I hold that the order passed by the respondent no.1 and 2 are not justified in view of the materials on record. Respondents nos 1 and 2 have not taken into consideration the following important circumstances.

- A) That the building in which the business premises of the petitioner no.1 as well as those 22 units of diamond cutters and polishers was not owned by either the petitioner no.1 firm or its partners.
- B) There is no material to show any relationship of ownership or control either by petitioner no.1 or any of its partners, in those 22 units.
- C) That there were separate leases in favour of petitioner no.1 firm and those 22 units with the public trust which is the owner of the said building known as Modeshwari Bhavan.
- D) The machineries and instruments owned and possessed by those diamond cutters and polishers were of their ownership and these diamond cutters and polishers were not given any finance for purchasing the said machinery or securing the lease of the property.
- E) Out of these 22 units 8 units situated in rooms nos 32,43,25,39,42,37,31 and 38 were not at all carrying out any business of diamond cutting and polishing for petitioner no.1 firm.
- F) Said diamond cutters and polishers were paying income-tax independently and each of them having individual separate registration under the Bombay Shops and Establishments Act.
- G) Diamond cutter and polisher-Keshavlal is having his unit in room no.29 and he had started his business on 5.1.76 whereas the petitioner no.1 firm has started its business on 1.4.76. 22 units were not established at one and the same time and they were established from time to time by different persons.
- H) The amount of Rs. 48 lacs paid by petitioner no.1 firm was paid for the job work



entrusted to those diamond cutters and polishers and not to the labourers by way of wages and said amount included profits of the owner of the unit and the owner of the unit paying income tax on the earning by him, after making payment to his labourers.

13. In the circumstances the petition deserves to be allowed and the orders passed by respondent nos 1 and 2 respectively on 15.11.84 and 16.6.83 deserves to be quashed and set aside. I therefore, hereby quash and set aside the said orders of respondents nos 1 and 2 respectively on 15.11.84 and 16.6.83 under the provisions of Employees Provident Fund & Misc. Provisions Act, 1952. The petition is allowed. Rule made absolute. In the circumstances parties to bear their respective costs.

(S.D.Pandit.J)